IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 10912 of 2006

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAVESHKUMAR HARKISHANDAS KAMDAR - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :

MR PM THAKKAR Senior Advocate with MRYOGESH S LAKHANI for Applicant
MR AY KOGJE, APP, for Respondent State
MR JITENDRA MALKAN, Assistant Solicitor General of India, for Ministry of External Affairs and MR Y.N. RAVANI for CBI as intervenors

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 10/10/2006

ORAL JUDGMENT

1.0 The applicant herein has prayed for grant of bail in connection with offence registered by Police Sub Inspector, DCB Rajkot City Police Station upon station diary entry No.32 of 2006 registered with Rajkot City "A" Division Police Station.

2.0 According to the police report, the applicant has committed offence of cheating and fraud in Buffalo District of U.S.A., and he has been convicted therein and the District Court of New York, Buffalo has issued a warrant of arrest and consequently a red corner notice was issued on 58.2006 and the applicant is shown as absconding.

2.1 The applicant was arrested by Sub Inspector, DCB Rajkot City, upon a station diary entry No.32 of 2006 registered with Rajkot City "A" Division Police station under selection 41(1)(g) of the Code of Criminal Procedure. In view of the red corner notice and a fax message from CID Crime and Railways, Gadhinagar, the applicant was kept under custody of the Judicial Magistrate, First Class, Rajkot City until the authorized officer of the USA Government issuing red corner notice does not take custody of the applicant under section 7(4) of the Extradition Act, 1962.

3.0 The applicant had preferred an application for bail before Judicial Magistrate (First Class), Rajkot on 5th August 2006 which came to be rejected by order dated 7th August 2006.

3.1 The applicant thereafter preferred Criminal Misc. Application

No.442 of 2006 before the Additional Sessions Judge, 2nd Fast track Court at Rajkot, which also came to be rejected by order dated 10th August 2006. Thereafter the applicant has preferred the present application.

4.0 At the request of Mr. Jitendra Malkan and Mr. Y.N. Ravani, they were permitted to appear as Intervenors in the matter for Ministry of external Affairs and CBI respectively by order dated 3rd October 2006.At their request the matter was earlier kept on 6th October and again it was adjourned to today. It is required to be noted that CBI or Ministry of external Affairs has not appeared before the Trial Court or Sessions Court. Heard the learned Advocates appearing for the respective parties.

5.0 Mr. P.M. Thakkar, learned Senior Advocate appearing with Mr. Y.S. Lakhani for the applicant submitted that the order of detaining under section 7(4) of the Act is without jurisdiction inasmuch as there is no appointment of judicial magistrate under section 5 of The Extradition Act, 1962. He submitted that the entire civil transaction is sought to be converted into a criminal offence only with a view to seek a red corner notice issued against the applicant. He submitted that a civil suit is already filed in the year 2004 by the State of New York which is still pending. He pointed out that the authorities have wrongly shown that the applicant is convicted in a criminal case by the Court of America. He submitted that the applicant is not even shown to be arrested at any point of time.

5.1 Mr. Thakkar further submitted that a general indemnity agreement has been executed between the company of the applicant and AIG

(Insurance Company) whereby the applicant and his wife have given their personal guarantee in their individual capacity and have also put their personal properties under the guaranteeship. He further submitted that the applicant has been staying at Rajkot and he has never tried to hide his identify and therefore there is no question of his absconding. He has also submitted that the presence of the applicant will be available for inquiry which might be initiated by Union of India in pursuance of the red corner notice issued by the Interpol and till that period it is improper to keep the applicant behind the bars without any justification.

6.0 Mr. Y.N. Ravani, learned Advocate appearing for CBI submitted that the applicant has rightly been detained and he is a fugitive under section 2(f) of the Act which reads as under:

> [f] "fugitive criminal" means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State."

He submitted that since the applicant is accused, the proceedings are justified and he should not be released.

7.0 Mr. Jitendra Malkan, learned Assistant Solicitor General of India, submitted that the Ministry of external Affairs has received a message from Embassy of the United States of America stating that the applicant has been charged with certain federal criminal offences in Western District of New York and therefore the Government of India i.e. Ministry of External Affairs is initiating necessary action to appoint an Extradition Magistrate under section 5 of Extradition Act, 1962. He has also

produced on record a letter received in this respect from the Joint Secretary. He, therefore, submitted that the applicant may not be released on bail as the extradition proceedings against him are in process.

8.0 Mr. A.Y. Kogje, learned APP appearing for the State Government has supported the say of Mr. Jitendra Malkan and Mr. Y.N. Ravani that bail may not be granted to the applicant. He submitted that the proceedings are initiated pursuant to the Red Corner Notice dated 5th August 2006.

9.0 Before proceeding further it would be profitable to look into certain provisions of The Extradition Act, 1962. Sections 5, 6 and 7 of the said Act read as under:

> "5. **Order for Magisterial inquiry:**- Where such requisition is made, the Central Government may, if it thinks fit, issue an order to any Magistrate who wold have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.
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> 6. **Issue of warrant for arrest** – On receipt of an order of the Central Government under section 5, the Magistrate shall issue a warrant for the arrest of the fugitive criminal.
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> 7. **Procedure before Magistrate** – (1) When the fugitive criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as nearly as may be, as if the case were on triable by a Court of Session or High Court.
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> [2] Without prejudice tot he generality of the foregoing provisions, the Magistrate shall, in particular, take such

> evidence as may be produced ins support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal is accused or has been convicted is an offence of political character or is not an extradition offence.
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> [3] If the Magistrate is of opinion that a prima facie case is not made out in support of the requisition of the foreign State, he shall discharge the fugitive criminal.
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> [4] If the Magistrate is of opinion that a prima facie case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government."

Thus, under section 5 of the Act, upon a requisition made by a foreign State the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of the jurisdiction, directing him to inquire into the case. The applicant has been arrested in pursuance the alleged red corner notice received by fax by the authority under section 41(1)(g) of Criminal Procedure Code. Clause 2.7 of the said notice states that there is an arrest warrant No.04-CR-156-A, issued on 16th July 2004 by the United States District Court, Western District of New York, Buffalo, New York, United States and the name of signatory is Mr. H. Kenneth Schroeder. However, learned Advocates for the Ministry of External Affairs, or CBI or State have failed to produce anything on record to show that in fact an arrest warrant has been issued against the applicant. Even though it is stated in the red corner notice that copy of arrest warrant is available at the General Secretary in the language used by the requesting country, no

such warrant is produced on record even after arrest of the applicant. In fact, nothing is pointed out that there is a conviction order existing against the applicant.

10.0 It is also required to be noted that the procedure as per the Extradition Act is that on a requisition the Central Government may issue an order to any Magistrate who should inquire into the matter. As per section 6, on receipt of the order from Central Government under section 5, the Magistrate shall issue a warrant for the arrest of the fugitive criminal. On the facts of the case a requisition has been received by the Central Government. However, it is an admitted position that the so far the Magistrate has not been appointed. From the communication produced by Mr. Malkan it only appears that the Government of India i.e. Ministry of External affairs is initiating necessary action to appoint an Extradition Magistrate under section 5 of Extradition Act, 1962. Therefore, it is clear that the Magistrate has not yet been appointed and unless such Magistrate is appointed, no warrant can be issued. It is therefore evident that the proper procedure has not been followed for arresting and keeping the applicant under custody.

10.1 Apart from that, learned Advocates appearing for the respondent authorities have failed to point out anything from the record to show that the applicant has been arrested, tried and convicted in a criminal case as stated in the red corner notice.

10.2 It is found from the record that there is a civil suit filed by the State of New York against the company of the applicant which is pending for final disposal. The applicant has been, upon exemption having been given by the civil court in America, has deposed by video

conferencing continuously for 7 hours on 13th July 2006. Therefore he is attending the trial of the said case after the alleged arrest warrant of the year 2004 which is subject matter of red corner notice.

10.3 As regards the amount of contract is concerned, the applicant and his wife have given personal guarantee on behalf of the company and the general indemnity agreement is produced on record. It is further found from the record that the applicant got and successfully completed the contract with NYS OGS. Each of the payment requests were duly checked by four or five officers of NYS OGS and payment was made by finance department. It is after completing the contract the applicant came to India and he has been staying in the same house i.e., at his birth place since his return to India. When the period of passport had expired in 2005, he had sent the same for renewal with return address to US authorities. The applicant is staying in India with all required visas and approvals by the concerned authorities and he is not likely to tamper with the evidence as all the documents are in possession of the US authorities. The fact that the applicant has attended the video conferencing in the pending suit, he is not likely to abscond and the applicant is not a hard core criminal. In any case, the averments made by the applicant are required to be accepted since no reply was filed either on behalf of the State or Ministry of External Affairs or CBI.

12.0 In any view of the mater, even according to the communication received by Mr. Malkan, the Government of India is still under the process of initiating action to appoint an Extradition Magistrate under section 5 of the Act and merely the process is on, the applicant cannot be kept under custody till the process is completed and I am of the view that the applicant can be released on bail on stringent conditions so that

the presence of the applicant can be secured at any time. On the facts of the case it is found that the alleged warrant is based on a misconception. In fact there is no conviction nor any order has been passed after 2004. On the contrary the facts show that the applicant has attended the video conferencing in a case pending in Civil Court in USA.Therefore if there is a warrant he could have been summoned by the concerned Criminal Court.

13. Considering the above aspects, the application deserves to be allowed. The application is accordingly allowed and the applicant is ordered to be released on bail in connection with offence registered by Police Sub Inspector, DCB Rajkot City Police Station upon station diary entry No.32 of 2006 registered with Rajkot City A Division Police Station on his executing a bond of Rs.50,000/- (Rupees fifty thousand only) with one surety of the like amount to the satisfaction of the lower Court and subject to the conditions that he shall:

[a] not take undue advantage of his liberty or abuse his liberty;

[b] not act in a manner injurious to the interest of the prosecution;

[c] maintain law and order;

[d] mark his presence before the A Division Police Station, Rajkot on every Monday between 9.00 a.m. And 2 p.m;

[e] not leave Rajkot and State of Gujarat without the permission of the concerned Court of Magistrate;

[f] furnish the address of his residence at the time of execution of the bond and shall not change the residence without prior intimation to the

Court;

[g] surrender his passport, if any, to the Lower Court, within a week if not already surrendered.

[h] give his contact numbers of his landline and mobile phone and it will be open to the police to verify the presence of applicant at Rajkot.

14. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or to take appropriate action in the matter.

15. Bail before the Lower Court having jurisdiction to try the case.

16. Rule is made absolute. It is clarified that the observations made hereinabove will not prejudice the concerned Magistrate, if appointed under section 5 of the Extradition Act, 1962.

7. Direct service is permitted.

[K.S. JHAVERI, J.]

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